

FEDERAL CIRCUIT COURT OF AUSTRALIA

KEO v MINISTER FOR HOME AFFAIRS & ANOR

[2020] FCCA 191

Catchwords:

MIGRATION – Partner (Residence) (Class BS) (Subclass 801) visa – decision of the Administrative Appeals Tribunal – whether the Tribunal erred in considering family violence in the context of assessing nature of relationship – whether Tribunal afforded appropriate weight to evidence – whether the Tribunal denied the applicant procedural fairness – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5F, 65, 359AA, 376, 476

Migration Regulations 1994 (Cth), reg.1.15A, cl.801.221 of sch.2

Cases cited:

Bala v Minister for Immigration & Border Protection [2019] FCA 600

Craig v State of South Australia (1995) 184 CLR 163

He v Minister for Immigration and Border Protection (2017) 255 FCR 41

Lee v Minister for Immigration & Multicultural & Indigenous Affairs [2005] FCA 464

Minister for Immigration & Border Protection v Singh (2014) 231 FCR 437

Minister for Immigration & Citizenship v Li (2013) 249 CLR 332

Minister for Immigration & Citizenship v SZMDS (2010) 240 CLR 611

Minister for Immigration & Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259

Minister for Immigration & Border Protection v Singh [2016] FCAFC 183

MZAIB v Minister for Immigration & Border Protection [2015] FCA 1392

Nguyen v Minister for Immigration & Border Protection [2018] FCA 1374

Pokharel v Minister for Immigration & Border Protection [2016] FCAFC 34

SAAP v Minister for Immigration & Multicultural & Indigenous Affairs & Anor (2005) 228 CLR 294

SZRUI v Minister for Immigration, Multicultural Affairs & Citizenship [2013] FCAFC 80

Tran v Minister for Home Affairs [2019] FCA 1126

Applicant:

CHARIYA KEO

First Respondent:

MINISTER FOR HOME AFFAIRS

Second Respondent:

ADMINISTRATIVE APPEALS

TRIBUNAL

File Number: PEG 393 of 2018

Judgment of: Judge Kendall

Hearing dates: 20 September 2019 and 30-31 January 2020

Date of Last Submission: 31 January 2020

Delivered at: Perth

Delivered on: 5 February 2020

REPRESENTATION

Applicant: In person

Counsel for the First Respondent: Mr A Gerrard

Second Respondent: Submitting appearance, save as to costs

Solicitors for the Respondents: Australian Government Solicitor

ORDERS

- (1) The application be dismissed.
- (2)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT PERTH

PEG 393 of 2018

CHARIYA KEO

Applicant

And

MINISTER FOR HOME AFFAIRS

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. By application filed in this Court on 19 July 2018, the applicant seeks judicial review of a decision of the Administrative Appeals Tribunal (the “Tribunal”) dated 6 July 2018.
2. The Tribunal affirmed a decision of a delegate of the then Minister for Immigration and Citizenship (the “Minister”) to refuse the applicant a Partner (Residence) (Class BS) (Subclass 801) visa (the “visa”).
3. The applicant now seeks judicial review of the Tribunal’s decision. This proceeding is brought pursuant to s.476(1) of the *Migration Act 1958* (Cth) (the “Act”). To obtain assistance from this Court, the applicant must show jurisdictional error on the part of the Tribunal.

4. The Court had the following materials before it:
 - a) the judicial review application;
 - b) an affidavit of the applicant sworn 19 July 2018;
 - c) a court book (“CB”) numbering 365 pages (marked as Exhibit 1);
 - d) written submissions filed by the Minister on 22 July 2019;
 - e) written submissions in reply filed by the applicant on 12 August 2019;
 - f) further written submissions prepared by the Minister on 18 October 2019; and
 - g) further written submissions in reply filed by the applicant on 14 November 2019.
5. For reasons that are explained below, this matter was heard over three days: 20 September 2019, 30 January 2020 and 31 January 2020.
6. The applicant appeared on her own behalf on all three occasions. She was assisted by a Khmer interpreter.
7. To the extent that the applicant’s submissions refer to her not having funds to secure a lawyer, while this is regrettable it is accepted that there is no right to legal representation in migration proceedings. The Court did, however (in its duty to self-represented litigants) do what it was able to do to assist the applicant and remained astute and alert to the possibility of legal error in the Tribunal’s decision: *MZAIB v Minister for Immigration & Border Protection* [2015] FCA 1392.

Background

8. The Minister’s submissions dated 22 July 2019 (at [3]-[13]) provide an accurate chronology of this matter. The Court adopts those submissions, with some minor amendments and additions, as follows.
9. The applicant is a citizen of Cambodia who first arrived in Australia on 31 October 2008 on a Tourist (Subclass 676) visa (CB 11 and 56).

10. On 7 November 2009, the applicant and her sponsor were married (CB 35-36). On 30 March 2010, the applicant applied to the former Department of Immigration and Citizenship (the “Department”) for a Partner (Temporary) (Subclass 820) Visa (CB 1-53).
11. On 19 April 2010, the applicant was granted a Partner (Temporary) (Subclass 820) Visa (CB 68-70).
12. On 21 July 2011, the applicant’s sponsor attended the Department and advised by letter that he wished to remove himself as a sponsor for the applicant (CB 74). He advised that at their wedding things were not “going well” and that they had “exaggerated their relationship” (CB 72-73).
13. In August 2011 (the exact date not recorded), the sponsor advised that he now wished to continue to sponsor the applicant (CB 67).
14. On 3 January 2012, the applicant was advised that the visa was now being considered and that further information was required (CB 79-81). The information that was requested was provided.
15. From April 2013, the delegate attempted to make contact with the applicant and the sponsor on a number of occasions. It appears that the telephone numbers that were provided had been disconnected (CB 119-121). The delegate sent an email to the applicant on 13 June 2013 advising that further information was required (CB 125-126).
16. On 29 July 2013, a delegate for the Minister refused to grant the applicant the visa (CB 143-154). The delegate was not satisfied that the applicant and sponsor were in a “genuine and continuing relationship”.
17. On 27 August 2013, the applicant applied to the Tribunal for review of the delegate’s decision (CB 161-171). A number of submissions were made on behalf of the applicant by her then representative. The applicant was also invited to (and did attend) a hearing before the Tribunal.
18. On 26 November 2014, the Tribunal affirmed the delegate’s decision not to grant the applicant the visa (CB 280-289). The Tribunal was not satisfied that the sponsor and applicant were ever in a genuine and continuing relationship.

19. On 23 December 2014, the applicant made an application in the Federal Circuit Court for judicial review of the Tribunal's decision. On 1 August 2017, the Court ordered, by consent, that the Tribunal's decision be quashed and directed that the Tribunal reconsider and re-determine the application. The Minister conceded that the Tribunal had denied the applicant procedural fairness in failing to disclose information contained in a certificate issued under s.376 of the Act (CB 157-158).
20. The applicant was then invited to attend a hearing before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review (CB 304-307). Written submissions and other documents were provided prior to the hearing (CB 320-338), while the applicant also requested that evidence be taken from her sister at the hearing (CB 318). On 11 April 2018, the applicant appeared before the Tribunal with the assistance of an interpreter (CB 340-342).
21. On 6 July 2018, the Tribunal affirmed the decision of the delegate to not grant the applicant the visa. That decision is the subject of judicial review in this Court.

The Tribunal's Decision and Relevant Legislation

22. The Tribunal's decision is 12 pages long and spans 86 paragraphs. The Minister's written submissions at [19]-[27] provide a detailed and accurate summary of the Tribunal's decision and (at [16]-[18]) the legislation relevant to this matter. The Court again adopts that summary, with some minor additions, as follows.
23. At [1]-[12], the Tribunal set out the factual background and history of the matter before it. The Tribunal confirmed that it had determined that the s.376 certificate was valid and that the information that was the subject of the certificate was relevant and would be released to the applicant during the Tribunal hearing pursuant to s.359AA of the Act (CB 347 at [8]-[9]).
24. The Tribunal then outlined the legislative provisions relevant to this matter (at [13]-[19]).

25. The relevant criterion in relation to this matter is cl.801.221(6) of the *Migration Regulations 1994* (Cth) (the “Regulations”), which provides:

...

(6) *An applicant meets the requirements of this subclause if:*

(a) *the applicant is the holder of a Subclass 820 visa; and*

(b) *the applicant would meet the requirements of subclause (2) or (2A) except that the relationship between the applicant and the sponsoring partner has ceased; and*

(c) *either or both of the following circumstances applies:*

(i) *either or both of the following:*

(A) *the applicant;*

(B) *a dependent child of the sponsoring partner or of the applicant or of both of them;*

has suffered family violence committed by the sponsoring partner;

...

26. In this case, the applicant was the holder of a Subclass 820 visa. Hence, cl.801.221(6)(a) was met.

27. The “relationship” between the applicant and the sponsor had ceased. That fact was not disputed. However, the Tribunal also needed to be satisfied that the requirements of cl.801.221(2) or (2A) would have been met had the relationship not ceased.

28. In relation to this matter, both cl.801.221(2)(c) and (2A)(b) required the Tribunal to be satisfied that:

the applicant is the spouse or de facto partner of the sponsoring partner.

29. Section 5F of the Act defines the term “spouse” as follows:

- (1) *For the purposes of this Act, a person is the spouse of another person if, under subsection (2), the 2 persons are in a married relationship.*
- (2) *For the purposes of subsection (1), persons are in a married relationship if:*
 - (a) *they are married to each other under a marriage that is valid for the purposes of this Act; and*
 - (b) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
 - (c) *the relationship between them is genuine and continuing; and*
 - (d) *they:*
 - (i) *live together; or*
 - (ii) *do not live separately and apart on a permanent basis.*
- (3) *The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.*

30. Regulation 1.15A(3) sets out the arrangements for the purpose of determining whether the matters in s.5F(2) of the Act are met. Specifically, this provision provides that the decision-maker, here the Tribunal, should consider:

- (a) *the financial aspects of the relationship, including:*
 - (i) *any joint ownership of real estate or other major assets; and*
 - (ii) *any joint liabilities; and*
 - (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) *whether one person in the relationship owes any legal obligation in respect of the other; and*

- (v) *the basis of any sharing of day-to-day household expenses; and*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for the care and support of children; and*
 - (ii) *the living arrangements of the persons; and*
 - (iii) *any sharing of the responsibility for housework; and*
- (c) *the social aspects of the relationship, including:*
 - (i) *whether the persons represent themselves to other people as being married to each other; and*
 - (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities; and*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one.*

31. If the Tribunal is satisfied that the applicant meets cl.801.221(6)(b), it can then turn to consider cl.801.221(6)(c) of the Regulations and any family violence claims. However, as will be discussed in detail below, if the Tribunal is not satisfied that the applicant meets cl.801.221(6)(b), it must refuse to grant the visa.
32. Here, the Tribunal observed that the evidence before it was that the applicant and sponsor had separated on 25 November 2013. The Tribunal then explained that the issue before it was whether, notwithstanding that the relationship had ceased, the applicant was

nonetheless eligible for the visa she was seeking. The Tribunal noted that the circumstances under which the applicant would be eligible for the grant of the visa were set out in cl.801.221(6) of sch.2 to the Regulations (CB 348 at [13] and [18]).

33. The Tribunal found that cl.801.221(6)(a), requiring that the applicant was a holder of a Partner (Temporary) (Subclass 820) visa, was met as the applicant was granted that visa on 19 April 2010 (CB 348 at [14]).
34. The Tribunal then explained that in order for the applicant to meet cl.801.221(6)(b), the relationship must have existed before it could be determined that the relationship had ceased. Hence, the Tribunal reasoned, it must be satisfied that a genuine spousal relationship existed (CB 348 at [15]).
35. The Tribunal referred to the definition of ‘spouse’ in s.5F in detail and reg.1.15A (CB 348 at [17]). The Tribunal was satisfied that the marriage satisfied the requirements for a valid marriage for the purposes of s.5F(2)(a) (CB 348 at [17]). The Tribunal then turned to consider the factors in reg.1.15A.
36. In relation to the financial aspects of the relationship under reg.1.15A(3)(a) of the Regulations, the Tribunal referred to the joint accounts of the applicant and sponsor held with the ANZ and Commonwealth Bank. It accepted that the bank accounts indicated a pooling of resources from July 2010 to October 2010 and from September 2011 to March 2012 (CB 348-349 at [20]-[25]).
37. However, the Tribunal found that there was no evidence that indicated a sharing or pooling of finances for other significant periods of time. Further, no documentary evidence had been provided to substantiate the applicant’s claims that she paid some household expenses. There were also allegations of misuse of joint finances and there were no joint assets and no joint liabilities. The Tribunal found that there were limited financial aspects of the relationship and, accordingly, gave limited weight to this aspect of the relationship (CB 348-350 at [25]-[37]).
38. The Tribunal considered the nature of the household under reg.1.15A(3)(b) and concluded that although there was some evidence

of a joint household, limited weight should be placed on that evidence because the sponsor worked away from the home for significant periods of time and when he was home he did little or no housework and he spent more than half that time alone (CB 351-352 at [38]-[48]).

39. The Tribunal noted that it disclosed the information in the certificate to the applicant (that she was not living with the sponsor and was living at her brother-in-law's house and did not engage with the sponsor), and put the information to her pursuant to s.359AA (CB 351 at [41]-[43]). The applicant responded that the information was not true (CB 351 at [44]).
40. The Tribunal reviewed the evidence relating to the social aspects of the relationship under reg.1.15A(3)(c) and found that there was some social recognition, as evidenced by the applicant's sister's evidence and statutory declarations submitted at the first Tribunal hearing (CB 352 at [49]-[53]).
41. However, the Tribunal considered that the declarants provided general and brief information and did not provide detailed opinions nor did their opinions appear considered opinions of the parties' relationship. The Tribunal put further information to the applicant and accepted the applicant's response. There was also a small sample of photographs of the applicant and sponsor in social settings. Accordingly, the Tribunal gave some limited weight to the social aspects of the relationship (CB 353 at [58]).
42. In relation to the nature of the parties' commitment to one another under reg.1.15A(3)(d), the Tribunal recounted the evidence that had been provided about the relationship from the applicant, including the sponsor engaging in heavy drinking and being verbally and emotionally abusive. On one occasion, the sponsor allegedly physically assaulted her (CB 353-354 at [60]-[66]). The Tribunal also noted that the applicant had provided an inconsistent account of an abortion she previously had and had reservations about accepting the timing of the abortion (CB 355 at [66]-[72]). The Tribunal referred to the evidence of the applicant's sister and did not accept parts of that evidence, including that the sister was not told of the abuse until two years after (CB 355-356 at [74]-[77]).

43. The Tribunal evaluated the evidence and stated that, despite the applicant and the sponsor having lived together for 4 years, the sponsor had spent more time living away from the home due to his work commitments and, during his weeks at home, would spend more time alone than with the applicant (CB 356 at [79]). The Tribunal considered that the evidence before it did not demonstrate any degree of companionship or emotional support. The Tribunal had regard to evidence that the sponsor continually threatened to have the applicant sent back to Cambodia and did not show her correspondence from the Department about her partner visa. The Tribunal considered that these matters suggested that the sponsor may not have seen the relationship as being long term. The evidence in the applicant's statutory declaration also described a turbulent relationship from the start of the marriage (CB 356 at [79]).
44. The Tribunal concluded that it was not satisfied that the applicant and sponsor were ever in a spousal relationship within the meaning of s.5F. Therefore, cl.801.221(6)(b) was not met and it was not necessary for the Tribunal to consider cl.801.221(6)(c) and the family violence claims (CB 356 at [82]-[83]).
45. The Tribunal affirmed the delegate's decision to refuse to grant the applicant a partner visa (CB 356 at [85]-[86]).

Proceedings in this Court

46. The applicant's judicial review application contains one ground of review, as follows:

The Administrative Appeals Tribunal (Migration and Refugee Division) erred jurisdictionally as it failed to take into account the domestic violence which was perpetrated by the sponsor within the duration of my genuine and continuing marriage to the sponsor.

47. The applicant also filed an affidavit sworn 19 July 2018. That affidavit provides as follows:

1) On 29 July 2013 the delegate to the Minister for Immigration & Border Protection refused me a Partner (Residence) (Class BS) visa under s.65 of the Migration Act 1958. The delegate was not satisfied that I was the spouse of

the sponsor under Section 5F of the Act unless the relationship has ceased and certain circumstances exist.

- 2) *I appealed to the Administrative Appeals Tribunal (Migration and Refugee Division) (AAT) and a hearing was held on 21 October 2014. I appealed on the basis of domestic violence I suffered under the sponsor during the course of my married relationship with the sponsor. The AAT affirmed the delegate's decision on the grounds it was not satisfied that there was a genuine and continuing spousal relationship with the sponsor.*
 - 3) *I then appealed to the Federal Circuit Court (FCC) to review the Tribunal's decision. However on 1st August 2017 the FCC quashed the Tribunal's decision and remitted the matter to the tribunal directing it to reconsider the decision on the basis of law. To my understanding the FCC quashed the tribunal's decision on the grounds it did not reveal the contents of a confidential certificate issued by the delegate to which the tribunal was privy to.*
 - 4) *On 11 April 2018 the tribunal held a hearing on my case. This time the tribunal disclosed the confidential certificate for my comment and clarification. However, the tribunal again reaffirmed the delegate's decision to refuse me a spouse visa on the grounds that I was not in a genuine spousal relationship. It did not consider my claims of domestic violence which occurred during my relationship with the sponsor. This is despite the tribunal's awareness of domestic violence perpetrated by the sponsor from*
81. *The evidence provided by the applicant at the hearing, in her statutory declaration and in the written submission ... that the relationship with [name omitted] (the Sponsor) was not a good one and that she was the victim of serious abuse by him from the early months of the marriage. [The sponsor] was an alcoholic and he smoked cannabis. He did not help her with housework. He spent little time with her and spent his time with playing games. She was subjected to verbal abuse, physical abuse and sexual abuse and terminated a pregnancy due to the unhappiness and abuse in her relationship and because of [the sponsor's] alcoholism*
- 5) *The tribunal was not satisfied "that the applicant and the sponsor were ever in a spousal relationship within the*

meaning of Section 5F”. In view of this the tribunal felt “it was not necessary for the tribunal to consider ... the family violence claims”. Enclosed at ANNEXURE marked “A” is a copy of the tribunal’s decision for the information of the court. A psychological report by the psychologist, Mr [T] supporting my domestic violence claims was provided to the member during the hearing.

- 6) *I believe the Tribunal made a jurisdictional error in that it did not give weight to the domestic violence claims which occurred during the course of my married relationship with my sponsor. Domestic violence occurred within the relationship and this directly contributed to the ceasure of the relationship which lasted four years from 7 November 2009 to 25 November 2013.*
- 7) *In view of the above I am now re-appealing to the FCC to review my partner application on grounds of domestic violence which was perpetrated by the sponsor in the course of my marriage relationship with him.*
- 8) *I hope the court will quash the tribunal’s decision and remit it to the tribunal for reconsideration on grounds that it failed to take into consideration my domestic violence claims within the duration of my marriage to the sponsor.*

(Identifiers omitted)

48. While the applicant has indicated with some precision what she thinks the Tribunal “did wrong”, the Court (noting that the applicant was legally unrepresented: *Bala v Minister for Immigration & Border Protection* [2019] FCA 600 at [7]) nevertheless explained to the applicant what the Court looks for when determining if the Tribunal has fallen into jurisdictional error. It was explained that for migration decisions, certain types of “mistakes” tend to arise. These most commonly include (but are not limited to) the following categories:

- a) where the decision-maker identifies the wrong issue or asks the wrong question: *Craig v State of South Australia* (1995) 184 CLR 163 (“*Craig*”) at 198;
- b) where the decision-maker ignores relevant material: *Craig* at 198;
- c) where the decision-maker relies on irrelevant material: *Craig* at 198;

- d) where the decision-maker fails to follow mandatory procedures: *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs & Anor* (2005) 228 CLR 294 at [207]-[208];
 - e) where the decision-maker shows actual or apprehended bias: *SZRUI v Minister for Immigration, Multicultural Affairs & Citizenship* [2013] FCAFC 80 at [2]; and
 - f) where the decision is illogical, irrational or unreasonable: *Minister for Immigration & Citizenship v SZMDS* (2010) 240 CLR 611 at [131]; *Minister for Immigration & Citizenship v Li* (2013) 249 CLR 332 at [26]-[28]; *Minister for Immigration & Border Protection v Singh* (2014) 231 FCR 437 at [44].
49. It was also explained to the applicant that this Court cannot review the merits of the Tribunal's decision or grant her the visa she now seeks. Rather, the role of the Court is restricted to determining if the Tribunal made a material error in arriving at the decision it arrived at: *Minister for Immigration & Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.
50. At the hearing on 20 September 2019, the Court asked counsel for the Minister to summarise the Minister's position in relation to the judicial review application. During the course of these submissions the Court raised with the Minister the issue of whether, and to what extent, the Tribunal can have regard to allegations of family violence in assessing whether there is a genuine marriage relationship. It emerged that this issue, and others that arose from the applicant's written submission, would be better addressed in written submissions. This, the Court determined, would allow the applicant to better understand the Minister's position in relation to this issue. The Court adjourned the matter part heard and requested submissions from the Minister and the applicant.
51. When the matter returned for hearing on 30 January 2020, the Court was not satisfied with the quality of the translation services provided and the quality of the court technology. Regrettably, the hearing was again adjourned until 31 January 2020. At that hearing, the applicant was asked if she had anything further she wished to tell the Court. In effect, the applicant indicated that some of her witnesses had not

appeared, relevant evidence had been overlooked, a certificate issued under s.376 of the Act had not been addressed properly and otherwise repeated her concerns that the Tribunal had not addressed the issue of family violence and/or treated her fairly.

52. These issues are addressed below.

The Sole Ground of Review

The Administrative Appeals Tribunal (Migration and Refugee Division) erred jurisdictionally as it failed to take into account the domestic violence which was perpetrated by the sponsor within the duration of my genuine and continuing marriage to the sponsor.

Minister's Submissions

53. The Minister's submissions filed 22 July 2019 addressed the sole ground of review as follows:

- a) only if, and after, the Tribunal was satisfied that the applicant had met either cl.801.221(2) or 801.221(2A) would the Tribunal need to consider whether the requirement in cl.801.221(6)(c) is met, which relates to the applicant having suffered family violence committed by the sponsor;
- b) put another way, the operation of the family violence exception in cl.801.221(6)(c) is predicated, relevantly, on there having been a spousal relationship which had ceased and if the Tribunal was not satisfied that such a relationship had ever existed, it did not need to consider the operation of cl.801.221(6)(c);
- c) here, the Tribunal decided that it was not necessary for it to consider the family violence claims under cl.801.221(6)(c) of sch.2 to the Regulations because it was not satisfied that the applicant and sponsor were ever in a spousal relationship within the meaning of s.5F;
- d) therefore, the Tribunal did not make any error by not considering the applicant's family violence claims under cl.801.221(6)(c);

- e) the Tribunal did, however, consider the applicant's family violence claims generally when it evaluated whether the applicant was the 'spouse' of the sponsor. The Tribunal referred to the applicant's allegations that:
 - i) the sponsor misused their joint account by mispending money on alcohol;
 - ii) the sponsor drank and did not care, and spent time alone drinking beer and playing games; and
 - iii) the day after the wedding the applicant started to see a different side of the sponsor and claimed that the sponsor drank a lot, controlled everything and abused the applicant verbally, sexually and physically;
- f) the Tribunal considered and gave weight to these allegations, amongst a number of other matters, as part of its decision-making in reaching the conclusion that the applicant was not the spouse of the sponsor;
- g) whilst the family violence allegations were not the sole basis upon which the Tribunal reached its conclusion that the applicant was not the spouse of the sponsor, the Tribunal did take this evidence into account as a circumstance of the relationship of the parties under s.5F and reg.1.15A;
- h) the Tribunal carefully and, it is submitted, correctly applied the legislative provisions in assessing whether the applicant was the spouse of the sponsor. The Tribunal applied an active intellectual process, gave proper, genuine and realistic consideration to each of the prescribed matters set out in reg.1.15A(3);
- i) the Tribunal was entitled to accept or reject or give such weight to the evidence proffered as it thinks appropriate in all the circumstances as part of its fact finding function; and
- j) accordingly, the applicant's allegation that the Tribunal did not consider or failed to take into account her family violence claims cannot succeed.

54. Consideration

55. As did the Minister, the Court interprets the applicant's sole ground of review as stating that the Tribunal erred in failing to expressly address cl.801.221(6)(c) of the Regulations.
56. This argument must be rejected.
57. As will be explained further below, the Tribunal (not being satisfied the applicant met cl.801.221(6)(b) of the Regulations) was not required to consider cl.801.221(6)(c). The Tribunal was required to refuse the visa: the Act, s.65.
58. To the extent that the applicant is saying that the Tribunal failed more generally to address the evidence as to family violence, this submission must also fail. A reading of the Tribunal's decision shows that the Tribunal did, in fact, address the evidence as to family violence when it determined that the applicant and her sponsor were not in a spousal relationship: [60], [62], [63], [64], [65], [66], [76] and [77].
59. Here, it cannot be said Tribunal failed to take into account, or engage with, the evidence before it in relation to the family violence.
60. The sole ground of review, accordingly is dismissed.

Additional Issue: Can the Tribunal assess evidence of family violence in determining whether a genuine spousal relationship exists?

61. Noting that the Tribunal did assess the evidence before it in relation to family violence, the Court queried whether the Tribunal could, in fact, address this issue when deciding that the parties were not in a spousal issue, thereby leading to situation whereby the Tribunal was not required to address the issue of family violence under cl.801.221(6)(c) of the Regulations.
62. The Court was particularly concerned that the Tribunal's approach would, in effect, result in a situation whereby a woman who had been subjected to family violence could, in effect, be penalised for that violence because the violence could stand as evidence that the

relationship she was in was not genuine. To be frank, that situation seemed quite unfair.

63. As will be explained below, while arguably perverse, under the current legislative scheme that is precisely what is permitted.
64. As noted above, the Minister was asked to provide written submissions in this regard. The applicant was also given an opportunity to respond. These submissions are addressed below.

Minister's Submissions

65. The Minister's submissions on this "additional issue" can be summarised as follows:
 - a) the Tribunal was required to have regard to all of the evidence material to the circumstances of the relationship. This included the applicant's evidence that the relationship was not a good one, was turbulent from the very beginning of the marriage and that she had been a victim of serious abuse from the early months of the marriage. The Tribunal considered this evidence in its assessment of the nature of the parties' commitment to each other, which is a factor required to be considered under reg.1.15A(3)(d);
 - b) the Tribunal's approach is entirely consistent with the legislation and the authorities;
 - c) in the present matter, the Tribunal made findings on the applicant's own evidence that it could not conclude that there was any degree of companionship or emotional support. That conclusion was not based solely or primarily on the applicant's allegations of family violence and had a clearly evident and intelligible justification;
 - d) given the findings made by the Tribunal, it is evident that the Tribunal must not have been satisfied that the applicant and the sponsor were in a married relationship within the meaning of s.5F(2) and reg.1.15A at the time when the family violence was said to have occurred; and

- e) it is clear that the Tribunal found that the applicant and the sponsor were not in a married relationship from the very early stages of the marriage. That finding is entirely consistent with the evidence before it and, in particular, the applicant's own evidence. To the extent that the Tribunal referred to the applicant's evidence in respect of the alleged family violence it was but one permissible factor amongst many which led the Tribunal to conclude that the parties were not in a genuine spousal relationship.

Applicant's Submissions

66. The applicant filed submissions on 14 November 2019. Those submissions respond to the Minister's submissions and relevantly provide:
- a) the Tribunal is aware from the report of a professional psychologist that the relationship between the applicant and sponsor was haunted by family violence perpetrated by the sponsor. The relationship ceased due to family violence;
 - b) it is clear that the Tribunal has to identify "all the pertinent circumstances of ... a married relationship". In view of this the Tribunal is obliged to look at all the pertinent circumstances when assessing the married relationship, including the applicant's alleged family violence perpetrated by the sponsor during the entire duration of the marriage;
 - c) the Tribunal did not consider the evidence of family violence in its assessment of the nature of the parties' commitment to each other, which is a factor required to be considered under reg.1.15A(3)(d);
 - d) it is only reasonable to expect that a married relationship in the context of the s.5F criteria will be affected by family violence;
 - e) the evidence of the applicant lends support to the applicant's contention that family violence and turbulence directly influenced the marriage relationship from the early days of the relationship;

- f) given the findings made by the Tribunal, the Tribunal ought to have been satisfied that the applicant and the sponsor were in a married relationship within the meaning of s.5F(2) and reg.1.15A at the time when the family violence occurred;
- g) it is not clear as to why the Tribunal found that the applicant and the sponsor were not in a married relationship during the time of the family violence. That finding is entirely inconsistent with the evidence before it and, in particular, the applicant's own evidence of the turbulent nature of the relationship due to family violence; and
- h) the Tribunal referred to the applicant's own evidence in respect of the alleged family violence only in passing. Family violence had played a major role in the duration of the relationship. The Tribunal should take this into consideration when assessing the genuine and continuing nature of the married relationship.

Consideration

- 67. As noted above, the Court's main concern here was whether (and to what extent) the Tribunal can take into account family violence when determining if the applicant was the spouse of the relevant sponsor.
- 68. The Tribunal's consideration of the evidence before it in relation to family violence weighed against the applicant in the sense that the evidence and allegations of family violence suggested that there never was a "spousal" relationship.
- 69. In *Pokharel v Minister for Immigration & Border Protection* [2016] FCAFC 34 at [44]-[45] ("*Pokharel*"), the Court considered whether the Tribunal had erred in failing to take into account allegations of family violence, and also whether the Tribunal was required to take into account the circumstances surrounding the family violence. The surrounding circumstances, it was argued in that case, tended to show that the relationship was a genuine spousal relationship (at [41]). At [44]-[45], their Honours stated:

44. It may be accepted that the circumstances surrounding allegations of the family violence were capable of influencing the question of whether the appellant and Ms

***W were ever in a married relationship.** The difficulty for the appellant is that the Tribunal's reasons demonstrate that it did consider both the allegations of family violence and the surrounding circumstances. The Tribunal summarised the appellant's evidence of family violence and the circumstances surrounding that violence.*

(Emphasis added)

70. The Court thus determined that the Tribunal was entitled to take into account family violence allegations and the circumstances surrounding those allegations when determining if the applicant and sponsor were ever in a married relationship.
71. Here, and contrary to the applicant's submissions that the family violence was not considered at all or "in passing", the Tribunal did consider the family violence claims and surrounding circumstances in great detail within the context of assessing the "nature of the parties' commitment".
72. The Tribunal extensively considered the applicant's evidence, including that the sponsor was verbally and emotionally abusive, and that there were also times when he was sexually and physically abusive and aggressive towards her (CB 353-354 at [60]-[79]). It was the applicant's evidence that this started on the first night of the marriage.
73. Here, the Tribunal clearly considered the family violence and the circumstances surrounding that violence. These matters formed part of the factual matrix that the Tribunal relied upon to determine that the applicant and sponsor were not in a spousal relationship: *Pokharel* at [45]. Specifically, the family violence and turbulent nature of the relationship indicated to the Tribunal that there was an absence of any degree of companionship or emotional support and that this persisted from the start of the relationship.
74. It was a matter for the Tribunal to determine what weight it gave the family violence claims in the context of determining whether the applicant met cl.801.221(6)(b). In light of the applicant's evidence that the relationship had been turbulent from the first night of the marriage and the other matters that arose in the course of the marriage since that time (including the family violence), it was not unreasonable or

illogical for the Tribunal to have formed the view that the evidence of the family violence and the turbulent relationship suggested that the nature of the parties commitment to one another was lacking. The Tribunal's assessment of the family violence evidence in the context of the question arising under s.5F was entirely open to it and entirely permissible. As the Minister submits, the family violence was not the sole basis for the Tribunal finding there was a lack of companionship and emotional support. There were a number of other matters, and specific evidence of the applicant, that the Tribunal took into account (CB 353-354 at [60]-[79]).

75. While the Court's concerns about the apparent unfairness of the current legislative regime for victims of family violence remain, *legally* it is clear that no error arises from the additional issue canvassed above and raised at hearing.

Applicant's Affidavit

76. Turning briefly to the applicant's affidavit dated 19 July 2018, paragraphs [1]-[4] and [7] are matters that set out the factual background and what the applicant seeks from the Court. They do not give rise to jurisdictional error.
77. Paragraph [5] has been addressed in the context of the consideration of the sole ground of the judicial review application. In circumstances where the Tribunal was not satisfied that the applicant and sponsor were in a spousal relationship, it was not necessary to consider the family violence claims in the context of cl.801.221(6)(c).
78. Insofar as paragraph [5] refers to the psychologist's report, the Tribunal acknowledged that report at [64]. Further, the Tribunal appears to have accepted the applicant's claims concerning the family violence and treatment by her husband. In those circumstances, to the extent it is suggested the Tribunal failed to consider the psychologist report, it is clear that it did so when it specifically asked the applicant to confirm a matter that was stated in the report.
79. In respect of paragraph [6] of the affidavit, it was ultimately a matter for the Tribunal to consider the evidence and arguments that were advanced by the applicant in order to establish that the relationship was

“genuine and continuing” and to weigh that evidence as it felt appropriate in the circumstances: *Lee v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 464 at [27] (“*Lee*”). The Tribunal did ultimately give weight to the applicant’s claims that she was abused; however, this was ultimately adverse to the applicant as it then stood as evidence that there was no “genuine and continuing relationship”. As explained above, it was entirely open to the Tribunal to reason in the way that it did in this regard.

80. Finally, in respect of paragraph [8], as outlined above, it is clear that the Tribunal considered the family violence that occurred during the marriage. The Tribunal explicitly noted that the “traumatic period” commenced from the first night of the marriage and continued. At [82] it is apparent that the Tribunal accepted that the applicant was the subject of “serious abuse”. Hence, not only did the Tribunal consider the family violence, it accepted that it had occurred.
81. No jurisdictional error arises from the issues raised in the applicant’s affidavit dated 19 July 2018.

Issues Arising from the Applicant’s submissions

82. As noted, the applicant filed submissions on 12 August 2019. Those submissions were lengthy and numbered 54 paragraphs. The Minister’s submissions filed 18 October 2019 responded to some of the matters that arose from the applicant’s submissions. In turn, the applicant’s submissions dated 14 November 2019 responded to the Minister’s arguments on particular aspects of the submissions dated 12 August 2019.
83. For the reasons that follow, none of the applicant’s submissions identify jurisdictional error on the part of the Tribunal.
84. To the extent that the submissions again argue that that the Tribunal failed to consider the family violence evident in the relationship, the Court refers to what it has already said above.
85. The Minister identified three potential errors that the applicant appears to refer to in her submissions. These can be summarised as follows:

- a) the Tribunal erred in its application of s.5F when considering whether there was a married relationship or, alternatively, that the Tribunal failed to have regard to relevant considerations when considering the matters set out in reg.1.15A (“Error 1”);
- b) the weight the Tribunal gave to certain parts of the evidence was “not fair” or unreasonable (“Error 2”); and
- c) the applicant was denied procedural fairness (“Error 3”).

86. Before turning to these matters, the Court makes some brief observations about other matters that appear to arise in the applicant’s written and oral submissions:

- a) largely, the matters in the submissions provide background, express disagreement with the Tribunal’s findings or seek to provide explanations for why things were a particular way (such as why the joint account was cancelled and why there were no joint liabilities). The submissions are, in effect, an invitation to engage in merits review. The explanations now provided are not matters the Court can consider;
- b) the applicant believes that the sponsorship Regulations and legislation generally are “unfair” for women who have been subjected to violence of the sort see here. The Court does not disagree. Unfortunately, the Court cannot assist the applicant in this regard. The need for legislative change is not a matter for the Court on judicial review (paragraph [50]). The sole question is whether the Tribunal erred in applying those Regulations that it was bound to apply;
- c) the Court cannot “repeal” “outmoded” Regulations. This is a matter for the Parliament (paragraph [51]); and
- d) noting the Court’s comments in b) above, the applicant’s commentary on the Regulations as “demanding” and “discouraging” are not amenable to any form of identifiable jurisdictional error (paragraph [52]).

87. The Court addresses the “errors” identified by the applicant in her submissions as follows.

Error 1

88. At [48] of the submissions the applicant states that the Tribunal came to an:

...erroneous conclusion that there did not exist a genuine and continuing marriage relationship taking into consideration SF criteria, namely, financial, household, social aspects and mutual commitment of the relationship.

89. The Minister considers that the error alleged here is that the Tribunal did not undertake the task required of it as stated in *He v Minister for Immigration and Border Protection* (2017) 255 FCR 41 (“He”).

90. In *Nguyen v Minister for Immigration & Border Protection* [2018] FCA 1374 at [46] (“Nguyen”), Justice White succinctly stated the principles derived from *He* as follows:

46. *As the decision of the Full Court in He v Minister for Immigration and Border Protection [2017] FCAFC 206; (2017) 255 FCR 41 provided the foundation for the appellant’s submissions on this ground, it is convenient to refer first to that judgment. In that case, the Full Court (Siopis, Kerr and Rangiah JJ) considered the effect of s 5F of the Act and of reg 1.15A of the Regulations. Their Honours concluded:*

- (a) the matters set out in reg 1.15A(3) are relevant considerations which the decision-maker is bound to consider, at [52];*
- (b) this requires the decision-maker to bring an active intellectual process to each matter, giving proper, genuine and realistic consideration to each, at [52];*
- (c) the requirement that the Tribunal “consider” the circumstances in reg 1.15A(3) means that the Tribunal is required to make findings upon each of the prescribed matters numbered with Roman numerals. The legislative intention is that the enumerated matters must be addressed, and not merely thought about, at [76]-[77]. However, it is not necessary for the Tribunal to address each of the enumerated matters in a formulaic manner. Nor is it necessary that it make findings upon every piece of evidence bearing upon an enumerated matter. Nevertheless, the Tribunal is required to make findings upon the matters enumerated in reg 1.15A(3), at [82]-[83]; and*

(d) the failure by the Tribunal set out in its reasons a finding concerning any of the enumerated matters may (but will not necessarily) lead to an inference that the Tribunal member made no such finding as part of his or her mental process in arriving at the decision, at [79].

91. Here, the Court is satisfied that the Tribunal correctly applied and understood the applicable legislation and principles. By reference to the matters in reg.1.15A of the Regulations, the Tribunal:

- a) noted that while some financial documents indicated a pooling of resources, there were substantial periods of time without any pooling of resources, there was an absence of joint assets or joint liabilities and there was limited evidence that the applicant paid for household expenses from her employment earnings. Overall, the Tribunal made findings on each of the integers of reg.1.15A(3)(a) and determined that it gave “little weight” to this “matter” (at [20]-[37]);
- b) in relation to the matters in reg.1.15A(b), referred to the applicant’s evidence that the sponsor “worked up North”, that he was away for most of the marriage and that when he returned he spent “more than half the time alone”. While there was some evidence of shared household responsibilities, the Tribunal placed limited weight on this given the large periods of time the sponsor was not home or “alone”. The Tribunal made findings on reg.1.15A(3)(b)(ii)-(iii) (noting reg.1.15A(3)(b)(i) was not relevant as there were no children of the relationship) such that it can be inferred the finding on reg.1.15A(3)(b) as a whole was that the nature of the household was of limited weight (at [38]-[48]);
- c) in relation to the social aspects of the relationship, accepted that there was some social recognition of the relationship. However, the Tribunal found the supporting declaratory evidence to be “general and brief”. Nonetheless, the Tribunal gave some weight to the social aspects of the relationship such that an express finding in relation to reg.1.15A(3)(c) was made (at [49]-[58]); and
- d) in relation to the matters in reg.1.15A(3)(d) concerning the nature of the parties’ commitment, the Tribunal extensively referred to the applicant’s evidence, noted the evidence of the applicant’s

sister and made reference to other evidence that had been provided. The Tribunal was not satisfied, in light of this evidence, that there was any demonstrated degree of emotional support and companionship and found that the sponsor did not see the relationship as “long term” (at [59]-[80]). From the findings made in relation to the integers of reg.1.15A(3)(d), it can be inferred that the nature of the parties’ commitment to one another was not a matter the Tribunal considered reflected a genuine and continuing relationship.

92. The applicant’s submissions dated 14 November 2019 respond to the Minister’s submissions and, although not entirely clear, suggest that the Tribunal examined the applicant’s case as if the family violence did not occur and argued that the Tribunal cannot make a finding on the applicant’s relationship without making a separate finding on the family violence claims.
93. The Tribunal did not examine the applicant’s case on the basis that the family violence did not occur. Rather, the Tribunal accepted that the applicant was the subject of abuse. The Tribunal, as it was entitled to do, considered the extent of the family violence to ultimately find that there was no married relationship. Further, as detailed above, no *separate* finding is required.
94. The Court is satisfied that the Tribunal considered each of the matters required of it and made the necessary findings, expressly or implicitly, in determining that the applicant and sponsor were not in a genuine and continuing relationship.
95. Error 1, accordingly, identifies no error.

Error 2

96. At various points in the applicant’s submissions she makes reference to, or takes issue with, the weight that the Tribunal gave to certain pieces of evidence.
97. The weight the Tribunal gives to evidence is a matter for the Tribunal: *Lee*.
98. Here, the Tribunal clearly considered and evaluated both the applicant’s and the sponsor’s evidence. It also took into account and

analysed the evidence provided by the applicant's sister, friends and neighbour.

99. To the extent the applicant says the weight afforded to the evidence of her supporting witnesses should have been greater, the Court can see no illogicality or unreasonableness in the Tribunal's assessment of this evidence. The Tribunal's reasons (at [54] and [55]) for affording the declarations of certain witnesses' limited weight is soundly based.
100. The applicant also says that the Tribunal gave the sponsor's evidence more weight and, as he was the perpetrator of the violence, no weight or little weight should be given to his evidence (see [29], [33] and [49] of the applicant's submissions).
101. Having reviewed the Tribunal's decision, there is no evidence that the Tribunal gave more weight to the sponsor's evidence. It appears the applicant may be referring to the information put to her under s.359AA of the Act when she references the "information" and "allegations" of the sponsor. If that is the case, the Court notes that the Tribunal determined not to put any weight on this information (or "allegations") (at [32], [47] and [69]) or accepted the applicant's evidence instead of this information (at [57]).
102. Error 2, accordingly is dismissed.

Error 3

103. The applicant suggests that she was denied "justice and fairness" because the Tribunal placed weight on information from "confidential sources".
104. In the written submissions from the applicant dated 14 November 2019, the applicant submits that information from confidential sources ought not to play any part in the Tribunal's decision-making process. She states further that the Tribunal has an obligation to reveal the contents of these sources so that she can engage in a critical examination of that information. Further, she states that putting to the applicant the "substance of the information" during the hearing is not fair and there was a requirement to disclose the information from the confidential sources in full: citing *Minister for Immigration & Border Protection v Singh* [2016] FCAFC 183 ("*Singh*").

105. The information to which the applicant is referring is information that was subject to a certificate issued under s.376 of the Act. The Tribunal noted at [8]-[9] that it had decided the certificate was valid, that it had provided a copy of the certificate to the applicant and that it would be releasing the information to the applicant during the hearing for comment pursuant to s.359AA of the Act.
106. To the extent that the applicant is relying on *Singh*, the Tribunal here acted in accordance with the principles articulated in *Singh* and the High Court in *Minister for Immigration and Border Protection v SZMTA* [2019] HCA 3.
107. Critically, the Tribunal notified the applicant of the fact of the certificate and the Tribunal put the substance of the information to the applicant for comment under s.359AA of the Act.
108. The applicant says that the Tribunal should have revealed the entire contents of the information and sought the applicant's comment "in writing".
109. A similar submission was made in *Tran v Minister for Home Affairs* [2019] FCA 1126. In that case, it was held that:

64. *The Minister submitted that there was no requirement in s 359A for the Tribunal to provide the appellants with the Departmental internal documents which recorded the anonymous information received. It was submitted the Tribunal's compliance with s 359AA rendered s 359A inapplicable: see s 359A(3). There is force in that submission. The Tribunal has a discretion as to the manner in which information is provided. Either of ss 359A or 359AA will adequately provide sufficient details of the information to an applicant and it cannot be said one is preferable to the other.*

...

67. *On the basis that the Tribunal disclosed to Ms Tran and her migration agent clear particulars of the information pursuant to s 359AA, s 359A was not applicable in the circumstances. There was no non-compliance with the latter section.*

110. In light of the above, there was no error in the Tribunal putting the information to the applicant orally at the hearing, as opposed to seeking her to comment in writing.
111. Further, the Tribunal ultimately determined not to put any weight on most of the information it put to the applicant under s.359AA of the Act and which had been obtained from a confidential source (at [32], [47] and [69]).
112. As for the Tribunal's consideration of the matters it put to the applicant at [70] of its decision, the Tribunal also appears not to have placed any weight on that information. The substance of that information was that the applicant had terminated a pregnancy and the sponsor was not the father of that child. The applicant confirmed that she had had an abortion. The Tribunal had concerns with the timing of the abortion – a concern that arose from other evidence. The Tribunal did not take issue with the allegation that the child was not the sponsor's child and appears to have accepted the applicant's evidence that the child was the sponsor's (see [74] and [81]). Hence, it rejected the information regarding the paternity of the child.
113. There was no denial of procedural fairness in relation to the confidential information the subject of the certificate. The applicant was on notice of the certificate and was given opportunity to comment on the substance of that information. Further, the Tribunal did not consider the information in the certificate adversely to the applicant.
114. Error 3, accordingly, is dismissed.

Errors Identified in Oral Submissions

115. As noted above, at hearing the applicant indicated that some of her witnesses had not appeared and relevant evidence had been overlooked.
116. The Court does not interpret the applicant as suggesting that the Tribunal denied her an opportunity to lead evidence from witnesses she had hoped would assist her. Nor is there any evidence to support that claim. Rather, it appears that some of the applicant's potential witnesses were not available on the day of the Tribunal hearing. This, unfortunately, is an issue for the applicant. Had she wanted an adjournment or more time to lead evidence, she should have requested

it. There is no evidence that that occurred here. In the circumstances, it cannot be said that the Tribunal fell into jurisdictional error.

117. Further, insofar as the applicant believes relevant evidence was “overlooked”, again, there is no evidence before the Court that relevant evidence was not addressed. What the applicant appears to be saying is that the Tribunal failed to address the evidence of family violence. As discussed, the Tribunal did address this issue and accepted that it had occurred.
118. No jurisdictional error arises in this regard.

Conclusion

119. While the Court is sympathetic to the concerns raised by the applicant in relation to the impact of the current legislative regime on women who have suffered family violence, the Court is not satisfied that the applicant has established any jurisdictional error on the part of the Tribunal. That is the only issue this Court can canvass on review and the Court is otherwise satisfied that there is no jurisdictional error in the Tribunal’s decision.
120. The application must, accordingly, be dismissed.

I certify that the preceding one hundred and nineteen (119) paragraphs are a true copy of the reasons for judgment of Judge Kendall

Associate:

Date: 5 February 2020